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upreme Court of the United States.

October Term, 1933.

No. 78

DAVID G. DIMICK,
Petitioner,

v.

PETER SCHIEDT,
Respondent.

rief in Opposition to Petition for Writ of Certiorari.

JOHN G. PALFREY,
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Supreme Court of the United States.

OCTOBER TERM, 1933.

No. 1103.

DAVID G. DIMICK,
PETITIONER,
v.
PETER SCHIEDT,
RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals is reported in 70 Federal (2d) 558, and appears in the record, commencing at page 43. No opinion was delivered by the District Court, but the order made by that court on the plaintiff's motion for new trial, from which the appeal was prosecuted, appears in the record at page 8.

JURISDICTION.

The jurisdiction of the Court to grant the writ under section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, now 28 U.S.C. sec. 347 (a), is not denied. The judgment of the Circuit Court of Appeals was rendered April 20, 1934, and the petition for certiorari was filed on or about May 31, 1934, within three months from the entry of such judgment.

STATEMENT OF THE CASE AND QUESTION INVOLVED.

The petitioner, defendant in the courts below, asks this Court to review the judgment of the Circuit Court of Appeals for the First Circuit which reversed a judgment of the District Court for the District of Massachusetts in favor of the respondent, the plaintiff below, and remanded the case to the District Court for further proceedings.

The plaintiff-respondent, a citizen of Massachusetts, brought this action against the petitioner, a citizen of Maine, alleging substantial personal injuries caused by the petitioner's negligent operation of an automobile on a public way in Massachusetts. The case was tried before a jury, who returned a verdict in favor of respondent in the sum of $500 (R. 7). The evidence (which forms part of the Record, pp. 10-39) tended to show that the plaintiff, if entitled to recover at all, was entitled to more than $500 for the suffering, loss of wages, and medical expenses incurred (R. 49). Accordingly, the plaintiff-respondent moved for a new trial, urging, among other grounds, that the verdict was against the weight of the evidence, that it was a compromise verdict and illegal, and that the damages were inadequate (R. 7, 8). The trial court made the following order in disposing of the motion for new trial (R. 8):

> "On the authority of *Gaffney* v. *Illingsworth,* 90 N.J.L. 490, and *Carr* v. *Miner,* 42 Ill. 179, if the defendant will file in this case a stipulation consenting to an increase of $1,000 in the damages from the sum of $500., as found by the jury, to $1,500. on or before April 21, 1933, the plaintiff's motion for a new trial is to be denied. Otherwise, it is to be granted and the case tried *de novo,* both on the question of liability and damages."

The petitioner filed the stipulation, and judgment was entered for the respondent in the sum of $1500, plus interest

and costs (R. 9). The respondent perfected his exception to the order and duly prosecuted an appeal from the judgment to the Circuit Court of Appeals (R. 9, 40). That court, after hearing, rendered its judgment reversing the judgment of the District Court and remanding the case to the District Court for further proceedings not inconsistent with the opinion (R. 50). The judgment was by a majority of the court, Morton, Circuit Judge, dissenting.

Summary of Argument.

I. The only ground stated in the petition for granting certiorari is the alleged importance of the question in federal practice, but this is not substantiated by any proof of importance either to the courts, the parties, or the public. The petitioner has not cited, here or in the court below, any decision of any court—federal, state or English—in which this "important" question has arisen. The lack of authority to sustain the order of the trial court suggests doubt whether there is any real question involved. The order tends to raise new legal problems rather than end litigation.

II. The judgment of the Circuit Court of Appeals was not a final determination of the substantive rights of the parties. Certiorari will not usually be granted prior to final judgment unless extraordinary circumstances so require. The question will in all probability be moot after a new trial, but the petitioner's right to seek review is not lost. The possibility of saving the expense of a new trial is entirely outweighed by the needless consumption of the time of this Court and the burdens of expense and delay imposed on the respondent by successive petitions for review.

III. Though containing a summary discussion of the merits, the petitioner's brief fails to show any probable

error in the decision below. No precedent for the order has been discovered by counsel, or by the judges of the Circuit Court of Appeals, or by the state courts where the question has arisen. This fact affords sufficient basis for the decision without consideration of the limitations imposed by the Seventh Amendment. And when these are considered, the decision is clearly correct, for the trial court has usurped the function of the jury in determining plaintiff's damages and has re-examined facts otherwise than according to the rules of the common law. Remittitur cases do not furnish a complete analogy for upholding the order, since remittiturs were not unknown when the Constitution was adopted. It is pure fiction to assume the jury intended to give the least amount recoverable, and the plaintiff is deprived of his right of trial by jury in being deprived of at least an election to take the amount so determined by the court or a new trial. The judgment of the Circuit Court of Appeals is both plainly right on principle and supported by the existing authorities.

Argument.

I. The alleged importance of the question in federal practice is not substantiated by any proof in the petitioner's brief.

The sole reason relied on by the petitioner in applying for a writ of certiorari is the presence of a question of practice in the federal courts of great importance to the bench and to the bar (Petition, p. 4). Beyond the bald assertion in the petition, however, it is nowhere made to appear that the question is of the importance ascribed to it therein.

First, of the importance of the question to the federal judges. The case is one where the plaintiff in a personal injury suit, having recovered a verdict establishing the liability of the defendant, is dissatisfied with the amount of

the damages and is asking for a new trial. The number of such cases on the docket of any district court, as compared to the entire number of cases pending before it, must be very small. The number of such cases in which the court concludes that the damages awarded are inadequate is decidedly much smaller. And the number of cases of the kind last described, in which a conscientious court would be willing to substitute its opinion as to the amount the plaintiff should recover instead of referring the question to a new jury, could scarcely warrant a serious contention that the business of the federal courts is hampered by lack of power of the court to make such an order, or that it would be materially expedited if that power were established. Therefore, as far as frequency of recurrence of the question is concerned, it can scarcely be regarded as of great importance to the bench or to the public either.

The petitioner's brief (p. 8) ventures a suggestion that the Circuit Court of Appeals found itself "not unwilling but unable to take a step which, perhaps, it might otherwise feel inclined to take." The inference intended is that the judges think they ought to have the power even if they did not have much occasion to use it, and that it is important for them to know if they do have it.

If the court below had deemed the question such an important one that it should be decided by this Court, that court could have adopted the way to assure a decision, namely, by certifying the question. 28 U.S.C. sec. 346. On the contrary, the inference of importance which the petitioner attempts to suggest is amply refuted by the conclusion of the majority opinion of the court:

> "As the granting of a new trial fully preserves the rights of both parties, it leads us to conclude that there is no necessity, or sound basis, for such a departure from the rules of the common law" (R. 50; 70 F. (2d) 562).

Secondly, the question is said to be important to the bar. But the petitioner has not cited, either here or in the court below, one decision of any court—federal, state, or English—in which the power of the trial judge to increase the verdict in a personal injury suit has been mentioned. It is to be expected that a question of importance to the bar would be the subject of at least some moot discussion if not of diverse opinions. The motion for a new trial because of excessiveness or inadequacy of the damages is certainly not new. For many years the common-law judges have dealt with such motions, without arrogating to themselves the power now claimed for them, and apparently this question of great importance has rarely arisen. Doubt may be properly expressed whether the bar even supposes that the matter could be open to question.

The petitioner urges further that the action of the District Court tends to "end litigation and lessen the expense." If it be assumed that the bar is interested in the former and if the contention is to be considered as a whole, the contention proves too much. No doubt it would be convenient at times if the court could compel the parties to settle their differences or at least compel them to forego trial by jury. Such power would tend to end litigation and surely lessen the expense.

The dissenting judge of the Circuit Court of Appeals (R. 52; 70 F. (2d) 563) felt that a trial judge ought to be able to state the minimum figure recoverable by the plaintiff, when the jury's verdict is inadequate, and give the defendant the election of paying it or submitting to a new trial. If the minimum amount of damages is a figure about which reasonable men might differ, then even this fact is peculiarly appropriate for a jury. If, on the other hand, it is such a sum that no reasonable men could differ as to the figure, then it is submitted the amount raises a question of law on which either party should be entitled to a review.

In Wisconsin, where, under local decisions, the court may increase verdicts, the Supreme Court passes on the question whether the amount is the least amount a jury could find, and almost every automobile case raises the legal question. Cf. *Risch* v. *Lawhead,* 211 Wis. 270, 278 (1933). *Guth* v. *Fisher,* 251 N.W. 223 (Wis. 1933). That the injection into the case of a new question of law subject to review by appellate courts would neither foster the end of litigation nor lessen the expense is obvious, and this argument must fail.

It is submitted, therefore, that petitioner has not in any way shown that the question raised by the case at bar is of such great importance to the courts, the bar, or the public in general as to justify the consideration of this Court.

II. Review of the present judgment is not shown to be of great importance even to the petitioner, for his rights are not concluded thereby.

The Circuit Court of Appeals, concluding that "a new trial fully preserves the rights of both parties," has remanded the case to the District Court for further proceedings (R. 50).

This judgment in no way affects any substantive rights of the parties. It is expressly provided in the order of the trial court that the new trial, if any, shall be "both on the question of liability and damages" (R. 8). Nothing in the judgment precludes the petitioner from showing on the new trial, and in the same manner as at the first trial, that he should not be liable for any greater sum than the amount of the judgment originally rendered, or from attempting again to show that he should not be liable at all. It is extremely unlikely that the present question would arise after a second trial.

Where the decision of the court of appeals has not determined the rights of the parties, but contemplates further

proceedings, the common practice of this Court has been, except in extraordinary cases, to deny certiorari, even though reversal would conclude the litigation.

Chicago & Northwestern Ry. v. *Osborne*, 146 U.S. 354.

Cf. American Const. Co. v. *Jacksonville Ry.*, 148 U.S. 372, 384.

Spiller v. *Atchison, T. & S.F. Ry. Co.*, 253 U.S. 117, 121.

And at such stage of the litigation an appeal has been held frivolous.

Slaker v. *O'Connor*, 278 U.S. 188.

It is obvious that no "extraordinary inconvenience and embarrassment" to the petitioner has been shown, or even suggested, to justify consideration of the case by this Court at the present stage of the proceedings. Of course, the denial of the writ is not equivalent to affirmance of the judgment, and, after a final determination of the rights of the parties, the petitioner would doubtless have an opportunity to seek a review by this Court, if the question were still deemed of importance to him.

Hamilton-Brown Shoe Co. v. *Wolf Bros.*, 240 U.S. 251, 258.

The only possible argument which petitioner can advance in favor of granting the writ at this time is that, by a reversal of the judgment of the Circuit Court of Appeals, petitioner might save the expense of a new trial. Affirmance means a new trial anyway. The consideration of the needless consumption of the time of this Court in deciding a question which may, and probably will, become entirely moot, and the expense and delay imposed on the respondent

through possible successive petitions for certiorari to this Court, it is submitted, more than abundantly outweighs this contention.

Since it has often been held that the importance of the question to the parties, as distinct from the general public, is not a sufficient argument for the allowance of the writ, it must follow that the writ will be denied where the question is not of vital importance even to the parties themselves.

III. The petitioner's brief fails to disclose any probable error in the judgment of the Circuit Court of Appeals.

The Circuit Court of Appeals put its decision on two grounds: that the action of the trial judge was not warranted by any precedent in the common law or by statute, and that, being unknown to the common law, it was a practice precluded by constitutional limitations embodied in the Seventh Amendment.

The first ground is not refuted by the petitioner, and alone is sufficient to sustain the judgment. Unless there is common law or statutory sanction, the power of a federal court, or any court, to increase a verdict without the consent of the parties cannot exist.

No statute, federal or state, has been cited as tending to sustain the trial court's action. The researches of counsel for both parties have failed to show any precedent for it. The independent extensive search made by the circuit judges (R. 46; 70 F. (2d) 560) discovered no case to support it. *Carr* v. *Miner,* 42 Ill. 179, and *Gaffney* v. *Illingsworth,* 90 N.J.L. 490, relied upon by the district judge, are distinguishable, as indicated in the opinion of the Circuit Court of Appeals, and are properly not urged as authorities by the petitioner.

The result is that petitioner has failed to point out any basis, plausible or otherwise, for his second specification of

error (Petition, p. 4). The argument made by the lack of precedent for such a relatively simple matter relating to new trials is unanswered and, as respondent contends, unanswerable. As it justifies the conclusion reached by the Circuit Court of Appeals, there should be no necessity of considering the argument based on constitutional limitations.

But the decision is rightly placed on this ground also. The Seventh Amendment guarantees to the plaintiff-respondent a right of trial by jury as it existed at common law when the Constitution was adopted, and further provides that "no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." Both parts of the amendment are violated by the order of the District Court.

The petitioner's only reply to this argument is the analogy of remittitur cases, and this analogy also seemed persuasive to the dissenting judge (R. 52; 70 F. (2d) 561). But the premise of the argument is that raising the verdict of the jury to an amount satisfactory to the court without consent of the plaintiff was unknown to the common law.

On the other hand, remittiturs, although eventually condemned in England—

> *Watt* v. *Watt,* 1905 A.C. 115;
> *Lionel Barber & Co.* v. *Deutsche Bank,* 1919 A.C. 304, 314—

were not unknown to the common law at or about the time of the adoption of the Constitution, and were in use in the early federal and state courts.

> *Pickwood* v. *Wright,* 1 H. Bl. 642 (1791).
> *Blunt* v. *Little,* 3 Mason, 102.
> *Lambert* v. *Craig,* 12 Pick. 198, 201.
> *Holmes* v. *Misroon,* 1 Tread. (S.C.) 21, 34.

Of course, being known to the common law, remittiturs are not within the prohibition of the Seventh Amendment.

Arkansas Valley Co. v. *Mann,* 130 U.S. 69, 72.

Thus, the supposed analogy of remittitur cases as authority for the order of the District Court fails in the very premise on which the constitutional validity of the former depends.

On principle, moreover, the judgment of the Circuit Court of Appeals is right in this respect. This Court, at the very same term at which it decided *Arkansas Valley Co.* v. *Mann, supra,* held that "in a case in which damages for a tort have been assessed by a jury at an entire sum, no court of law, upon a motion for a new trial for excessive damages and for insufficiency of the evidence to support the verdict, is authorized, according to its own estimate of the amount of damages which plaintiff ought to have recovered, to enter an absolute judgment for any other sum than that assessed by a jury."

Kennon v. *Gilmer,* 131 U.S. 22, 29.

The Court further held that *both* parties were prejudiced by such an order of the trial court.

Thus, though the court may tamper with the plaintiff's excessive verdict in a remittitur case, it may not compel him to take the reduced amount, but always must allow the alternative of a new trial. To give the wrongdoer the election of paying the minimum damages or taking a new trial may fully protect his rights but, when the plaintiff's rights are considered, it is difficult to distinguish such an order from the compulsory remittitur forbidden by *Kennon* v. *Gilmer, supra.*

Moreover, in remittitur cases, the court assumes in favor of the verdict that the jury merely erred in applying the rule of damages, for otherwise the verdict could not stand at all.

Minneapolis, St. Paul &c. Ry. Co. v. *Moquin,* 283 U.S. 520.

The amount by which the verdict exceeds the largest amount recoverable is obvious error, but the jury have awarded in favor of the plaintiff, and against the defendant, the entire amount for which the judgment is entered. But when the jury has awarded less than they should, while the difference between the verdict and the minimum recovery is also obvious error, the increased sum cannot in any sense be regarded as the amount awarded by the jury in favor of the plaintiff or against the defendant. To say the jury *intended* to award the least amount in their power is a fictitious explanation as to the probable cause of their error and a speculation as to the extent of the same. The plaintiff's right of trial by jury cannot thus be circumscribed by judicial speculation as to the extent of the wrong done him.

Minneapolis, St. Paul &c. Ry. Co. v. *Moquin, supra.*

The decision of the Circuit Court of Appeals is not only sound on principle, but it has also the support of the few authorities which may be found.

In its most recent pertinent decision this Court reversed a judgment of a Circuit Court of Appeals which had ordered an increase in the verdict to the minimum amount which that court thought the plaintiff could recover.

Fairmount Glass Works v. *Cub Fork Coal Co.*, 287 U.S. 474.

While different considerations applied to this decision, and the case at bar is distinguishable, the result tends to support the view that no federal court may substitute its view of the damages for the amount found by the jury.

See 287 U.S. at p. 480.

In the Massachusetts state courts remittiturs are expressly authorized by statute, General Laws (Ter. Ed.), chapter 231, section 127, but the court said:

> "but the statute does not confer the right even with the assent of the defendant to impose upon a plaintiff a voluntary acceptance of an assessment to be ascertained by the judge where the verdict of the jury has been adverse. . . . This course cannot be taken without the concurrence of both parties."

Shanahan v. *Boston & Northern St. Ry.*, 193 Mass. 412, 414.
Phillips v. *Granger*, 134 Mass. 475.

The court may not even add interest to the verdict.

Minot v. *Boston*, 201 Mass. 10, 12.

In California remittiturs were early recognized by judicial decision (see *Carpentier* v. *Gardiner*, 29 Cal. 160, 165 (1865), but the power of the trial court to compel the plaintiff to accept damages assessed by the court was vigorously denied in *Werner* v. *Bryden*, 84 Cal. App. 472, where the court said:

> "But no case has been discovered in which an order such as that in question here has been upheld. . . . The question is not whether the amount fixed by the court is a reasonable sum to be allowed as damages, but the plaintiff has the constitutional right to have such damages assessed by the jury."

Adamson v. *County of Los Angeles*, 52 Cal. App. 125, which is cited in the dissenting opinion (R. 54; 70 F. (2d) 564), was an attack by a third person where both litigants had consented to an increase in the verdict, and hence is not an authority contra.

The Michigan courts have frequently ordered remittiturs, but refuse to permit an increase in the verdict. Of such an order, it was said: "We have been unable to find any case sustaining this holding and we think it was unauthorized and erroneous."

Lorf v. *City of Detroit,* 145 Mich. 265, 267.

And in a later case—

> "We cannot, however, agree with him as to his right to annex such a condition. It was equivalent to the trial court himself assessing the damages. This is the province of the jury."
>
> *Goldsmith* v. *Detroit, Jackson & Chicago Ry.,* 165 Mich. 177, 179.

See also *Stanton* v. *Foley,* 168 Mich. 453, 456.

Wisconsin has a very liberal practice regarding remittiturs. Yet in a very recent case involving an increase in the verdict to the least amount the jury could award, the Supreme Court concluded that—

> "Since the court finds the 'least amount', plaintiff must be given an option to consent to the amount of damages found by the court."
>
> *Risch* v. *Lawhead,* 211 Wis. 270, 278 (1933), *supra.*

All these authorities recognize the constitutionality of remittiturs, and yet regard them as no support for the validity of an order such as that in question. The result is that petitioner has failed to cite any authority tending to show that there was a likelihood of error in the second ground upon which the decision rests. Sound principles, as well as the foregoing citations, clearly support the deci-

sion, and in the absence of any contrary authority show that no occasion exists for granting the review sought by the petitioner.

Conclusion.

The petitioner's brief fails to show that the question to be reviewed is important to the courts, the public, or even to the parties themselves. It fails to show that there is any diversity of opinion among the authorities or any ground upon which this Court might reach a different conclusion from the decision below.

On the contrary, it appears that the question is likely to become moot and that the rights of the parties are fully protected by granting the new trial. It has also been shown that the decision not only was plainly right on principle, but has the support of the few authorities existing, and that researches of the circuit court judges, of counsel, and of the judges in several of the highest state courts have failed to discover any precedent for the action of the District Court.

Accordingly, we respectfully urge that the petition be denied.

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